UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

TYRONDA JAMES,
Plaintiff,

v.

RD AMERICA, LLC, *d/b/a* Restaurant Depot, JETRO HOLDINGS, LLC, *d/b/a* Restaurant Depot, RESTAURANT DEPOT, LLC, *d/b/a* Restaurant Depot,
Defendants.

No. 3:16-cv-1445 (VAB)

ANNOTATED POST-TRIAL JURY INSTRUCTIONS
(Revised and with Redlines)

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INTRODUCTION

Members of the jury, you now have heard all of the evidence. I now will instruct you about the law applicable to this case. After these instructions, you will hear the closing arguments of counsel, and I will provide some final instructions. You then will return to the jury room to deliberate in accordance with these instructions. But first, I want to express my gratitude to each of you for the time and energy you have devoted to this trial. Jury service is rarely convenient, but without you, justice could not be done in this case. Thank you.

It will take some time for me to read these instructions to you, but it is important for you to listen carefully. I will go as slowly as I can and be as clear as possible. At the start of the trial, I told you that your principal function was to listen carefully and observe each witness who testified. I ask you to give that same careful attention, as I instruct you on the law. You have been provided with a copy of my instructions so that you can read along as we go. Please feel free to write on these copies. You will be permitted to take them into the jury room with you.

My instructions will be in three parts. First, I will discuss general rules concerning the role of the court and the duty of the jury. Second, I will go over the issues in this case and set out the specific questions of fact that you must answer based on the evidence at trial. Third, I will give you some rules and guidelines for your deliberations.

Before we begin, I ask you to look over the other document that was placed on your seats—namely, the Verdict Form. After I have given these instructions and you hear the closing arguments of counsel, you will go back into the jury room to deliberate. You will have with you the following: the original of the Verdict Form, copies of the original exhibits, your copies of these instructions, and any personal notes that you may have taken. At the conclusion of your deliberations, you will use the Verdict Form to report your verdict to the court and the parties.

I. GENERAL INSTRUCTIONS

A. ROLE OF THE COURT

As the judge, I perform two basic functions during the trial. First, I decide what evidence you may consider. You have heard me doing that throughout the trial. Second, I instruct you on the law that you are to apply to the facts in this case. I gave you some preliminary instructions before trial began, and some during the course of the trial, but it is now—at the close of evidence—that the final instructions are given, so please be patient and listen closely. If, in closing arguments, the parties state the law differently from the way I am explaining it to you, you are to follow my instructions.

I believe that everything I am going to tell you now is consistent with the preliminary instructions I gave you at the start of the trial, but if you have any doubt, you should not rely on anything different I may have said in the preliminary instructions. The instructions I am giving you now must guide your deliberations in this case.

B. INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

This is a long instruction, and I may repeat certain parts. That does not mean that those parts should be emphasized. You should not single out any one part of my instructions and ignore the rest. Instead, you should consider all of the instructions as a whole and consider each instruction in light of all the others. The order in which I give you instructions does not indicate their relative importance. Do not read into these instructions, or into anything I have said or done, any suggestion about what verdict you should return—that is a matter for you alone to decide.

I should also point out to you that, although you have been given a copy of the instructions to follow as I deliver them, if I say aloud anything at all different from what is written, you must follow what I say here in court.

C. BOTH SIDES ENTITLED TO FULL AND FAIR HEARING

Regardless of your ultimate decision about the parties' claims and defenses, the parties in this case are entitled to a full and fair hearing. The parties are entitled to a trial free from prejudice or bias. Our justice system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence, regardless of the final outcome of the case.

It is your duty, therefore, to give careful thought to every issue set forth by these instructions, regardless of any general feeling that you may have about which party is right. In deciding the facts or applying the law as I have given it to you, you must not be swayed by bias or prejudice for or against any party. All persons and all institutions stand equal before the law and are to be dealt with as equals in a court of justice, regardless of who they are. You must not be swayed by your personal opinions about any of the issues raised in this trial. You should not be swayed by sympathy. You should be guided solely by the evidence presented during trial and the law that I give you, without regard to the consequences of your verdict.

D. OBJECTIONS AND RULINGS

Our courts operate under an adversary system in which we believe that the truth will emerge through the competing presentations of adverse parties. It is the role of attorneys to press as hard as they can for their respective positions, and in fulfilling that role, they have a duty to object to the introduction of evidence that they believe is not properly admissible. You should not prefer or dislike an attorney or a party because an attorney did or did not make objections during the trial. The application of the rules of evidence is not always clear, and lawyers often disagree about them. It has been my job as the judge to resolve these disputes during the course of the trial.

It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case, and are not to be considered as a preference

for one side or the other. You are not to concern yourself with why a lawyer made an objection or why I ruled on it in the manner that I did. You should draw no inference from the fact that a lawyer objected to evidence. Nor should you draw any inference from the fact that I might have sustained or overruled an objection. My rulings on objections have nothing to do with the merits of the case or with the credibility of the witnesses

If I have allowed testimony or evidence that an attorney objected to, you should not give that evidence greater or lesser weight. If I have sustained an objection to a question asked of a witness, you must disregard the question entirely, and may draw no inference from the question, nor speculate about what the witness would have said, if he or she had been permitted to answer the question. You must disregard any testimony that I have stricken, because it is not evidence. Finally, if I instructed you to consider an item of evidence for a limited purpose only, you must follow that limiting instruction and use the evidence only for the limited purpose for which it was admitted.

One further note about attorneys: during the course of the trial, one cannot help but recognize the various personalities and styles of the attorneys. But it is important for you as jurors to recognize that this is not a contest among attorneys. Whatever you may think about the conduct of the lawyers during this trial, you must remember that this dispute is about the parties, not the lawyers, and you must decide this case solely on the basis of the evidence. Remember, statements and characterizations of the evidence by the attorneys are not evidence. If you find their closing arguments to be helpful, take advantage of them, but it is your memory, your evaluation of the evidence, and my instructions on the law that matter in this case

E. DUTIES OF THE JURY

As members of the jury, you are the sole and exclusive judges of the facts. It is your duty to find the facts from all of the evidence in the case. You determine the credibility of witnesses.

You resolve any conflicts that may exist in the testimony. You draw whatever reasonable inferences you decide should be drawn from the facts you determine, and you weigh the evidence.

No one may invade your province or function as jurors. Because you are the sole and exclusive judges of the facts, I do not mean to indicate, in this charge or at any time during the trial, any opinion as to the facts or as to what your verdict should be. My rulings on the admissibility of evidence during the trial are not any indication of a view of what your decision should be or which party should prevail in this case, because I have no view on those matters.

In order to determine the facts, you must rely upon your own recollection of the evidence. In reaching a verdict, you must carefully and impartially consider all of the evidence in the case and then apply the law, as I have explained it to you. Regardless of any opinion you may have about what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you. You must do your duty as jurors regardless of any personal likes, dislikes, opinions, prejudices, or sympathies that you may have. In other words, you must decide the case solely on the evidence before you, and you must do so fairly and impartially.

You must reach a unanimous verdict; that is, a verdict agreed upon by each of you. You must each decide the case for yourself, but do so only after impartial consideration of the evidence in the case with your fellow jurors.

F. "PROVE", "FIND", AND "ESTABLISH

Throughout the remainder of my instructions to you, I will use the word "prove" when talking about what Ms. James must do in order to win this case. My use of the word "prove" means "prove by the appropriate burden of proof," even if I do not always repeat those words. Similarly, when I speak of your "finding" various facts or the parties "establishing" various facts,

you must determine whether those facts have been proven by the appropriate burden of proof, even if I simply use the word “find” or “establish.”

G. BURDEN OF PROOF - PREPONDERANCE OF THE EVIDENCE

Because this is a civil case, Ms. James has the burden of proving every disputed element of her claims by a preponderance of the evidence.

To establish a fact by a preponderance of the evidence, the party with the burden of proof must prove that the fact is more likely true than not true. You will recall the example I gave you at the beginning of this trial of the scales of justice. For the plaintiff’s claims, if you find that the credible evidence on a given issue is evenly divided between the plaintiff and the defendant, or tips in favor of the defendant, then you must decide that issue for that defendant. However, if the plaintiff proves that a fact is more likely true than not, even if only slightly more likely true than not, then you are to find that the plaintiff has proven that fact by a preponderance of the evidence.

In determining whether a claim has been proven by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have presented them. A preponderance of the evidence means the greater weight of the evidence; it refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents presented.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this, and you should not consider or discuss that standard in your deliberations.

H. FORMS OF EVIDENCE

Next, I want to discuss with you generally what we mean by evidence and how you should consider it. The evidence from which you are to decide what the facts are comes in a few forms:

First, there is the sworn testimony of witnesses, both on direct examination and cross-examination, and regardless of who called the witness.

Second, there are the exhibits that have been received into the trial record. All of the exhibits that have been admitted into evidence will be with you in the jury room. If an exhibit has been admitted into evidence, it is evidence that can be considered by you, regardless of whether any witness referred to the exhibit or testified about it during the trial.

One word about the exhibits that you will have in the jury room. You may notice that certain exhibit numbers have not been used. For example, you may find exhibit number 5 and number 7 but not find number 6. Please do not be concerned about the numerical sequencing of exhibits and do not think that an exhibit is missing. The reason for what would otherwise seem like gaps is that we assigned all of the potential trial exhibits numbers long before trial, and then before or during trial, counsel decided not to introduce certain exhibits or certain exhibits were simply marked for identification purposes and then not made full exhibits. We have checked the exhibits and made sure that you will have all of the exhibits that you should have, so once again do not pay any attention to the numbering or sequencing of the exhibits.

I. WHAT IS NOT EVIDENCE

It is the witnesses' answers, and not the lawyers' questions, that are evidence. At times, a lawyer may have incorporated into a question a statement that assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and

if there is no evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because the assumed fact was contained in the question.

Testimony that I have ordered stricken, testimony that I have instructed you to disregard, and testimony that I have excluded are not evidence and may not be considered by you in rendering your verdict.

What the lawyers say in their opening statements and closing arguments, in their comments, objections, and even in their questions is not evidence. What they say in their closing arguments is intended to help you understand the evidence and to reach your verdict. If your recollection of the evidence differs from their statements, however, you should rely on your memory.

Moreover, what I may have said during the trial or what I may say in these instructions is not evidence, and my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence.

It is for you—and you alone—to decide the weight, if any, to be given to the testimony you have heard and to the exhibits you have seen.

J. DIRECT & CIRCUMSTANTIAL EVIDENCE

There are two types of evidence that you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence includes a witness's testimony about something the witness knows by virtue of his or her own senses—something he or she has seen, felt, touched, or heard. For example, if a witness testified that when she left her house this morning, it was raining, that would be direct evidence about the weather.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. For example, as I noted before trial, assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Also assume that as you were sitting here,

someone walked in with an umbrella that was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts that I have just presented to you, it would be reasonable and logical for you to infer that it had been raining.

That is all there is to circumstantial evidence. On the basis of your reason, experience and common sense, you infer from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that your verdict be based on a preponderance of all of the evidence presented.

K. INFERENCE DEFINED

During the trial you may have heard the attorneys use the term "inference," and in their arguments, they may ask you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical conclusion that a disputed fact exists because another fact has been shown to exist.

There are times when different inferences may be drawn from the same facts, whether proven by direct or circumstantial evidence. One party may ask you to draw one set of inferences, while the other party asks you to draw another. It is for you, and you alone, to decide which inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you are permitted, but not required, to draw from the facts that have been established by either direct or circumstantial evidence. In

drawing inferences, you should exercise your common sense. The mere process of drawing an inference from the evidence does not change the burden of proof. Finally, you may not draw any inferences from the mere fact that the plaintiff filed this lawsuit or that the defendants have chosen to defend it.

L. WITNESS CREDIBILITY - GENERAL

You have had the opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence that may help you decide the truth and the importance of each witness's testimony.

How do you determine a witness's truthfulness? You base it on what you have seen and heard. You watched the witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Was he or she frank, forthright, and candid, or evasive and edgy, as if hiding something? How did the witness appear; what was his or her demeanor—that is, his or her behavior, manner, and appearance while testifying? Often it is not what a person says but how he or she says it that convinces us.

You should use all the tests for truthfulness that you would use in determining matters of credibility in your everyday lives. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he or she testified; the accuracy of the witness's memory; the witness's candor or lack of candor and intelligence; the reasonableness and probability of the witness's testimony; its consistency or lack of consistency; and its corroboration or lack of corroboration with other

credible testimony.

Always remember that, in assessing any witness's testimony, you should use your common sense, your good judgment, and your own life experience.

M. ALL PERSONS STAND EQUAL BEFORE THE LAW

As you know, this case involves an employee and her employer. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar station in life. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

N. IMPEACHMENT OF WITNESS

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something inconsistent with the witness' present testimony. It is your exclusive province to give the testimony of each witness such credibility or weight, if any, as you think it deserves.

If you find that a witness testified untruthfully in some respect, you may consider that fact in deciding the weight you will give to that witness's testimony. Considering that fact and all other relevant evidence, you may accept or reject the testimony of each witness either in whole or in part.

O. UNCONTRADICTED TESTIMONY

You are not required to accept testimony even though the testimony is uncontradicted and the witness is not discredited or impeached. You may decide, because of the witness's manner

and demeanor or because of the improbability of his or her testimony or for other reasons, that the witness's testimony is not worthy of belief.

On the other hand, the testimony of a single witness may be enough to convince you of a fact in dispute, if you believe that the witness has truthfully and accurately related what, in fact, occurred.

II. THE ISSUES AND CLAIMS IN THIS CASE

Before I begin my instructions about the specific issues and claims in this case, a word of caution. Although there are several corporate defendants in this case, they jointly employed Ms. James and are treated, accordingly, as one employer—Restaurant Depot. A finding of liability as to one of these entities is, accordingly, a finding of liability as to all three. For this reason, the parties and the Court have, throughout this trial, referred to the Defendants collectively as Restaurant Depot, and will continue to do so.

I will now instruct you on the specific claims made by Ms. James and the defenses raised by Restaurant Depot. I will begin by explaining the law applicable to Ms. James's claim under Title VII.

A. TITLE VII

The federal law that Ms. James claims alleges Restaurant Depot violated is Title VII of the Civil Rights Act of 1964. I will refer to that as "Title VII."

Title VII prohibits employers from discriminating against employees on the basis of race, including by means of what is called a "hostile work environment."[1] Ms. James claims that Restaurant Depot violated Title VII by creating or maintaining a racially hostile work environment.

In order to prove her hostile work environment claim against Restaurant Depot, Ms. James must first prove the following elements by a preponderance of the evidence:

[1] *See Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013) ("Title VII of the Civil Rights Act of 1964 makes it 'an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e–2(a)(1). This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts. But not long after Title VII was enacted, the lower courts held that Title VII also reaches the creation or perpetuation of a discriminatory work environment . . . . When the issue eventually reached this Court, we agreed that Title VII prohibits the creation of a hostile work environment."); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 ("'*Quid pro quo*' and 'hostile work environment' do not appear in the statutory text [of Title VII]. The terms appeared first in the academic literature, found their way into decisions of the Courts of Appeals, and were mentioned in this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)."") (citations omitted); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

1. That she was subjected to unwelcome harassment, ridicule, insult, or other offensive conduct in the workplace;
2. That the offensive conduct was motivated, at least in part, by her race;
3. That the offensive conduct was severe or pervasive enough to alter the conditions of Ms. James's employment and create an abusive working environment that a reasonable person in Ms. James's position would find hostile or abusive, and that Ms. James herself perceived to be abusive; and
4. That Defendants can be held responsible for creating or maintaining the hostile work environment.

Before I discuss Ms. James's allegations of how Title VII was violated by Restaurant Depot any further, I will first explain each of the elements in greater detail.

B. ELEMENTS OF A TITLE VII HOSTILE WORK ENVIRONMENT CLAIM

1. Unwelcome Harassment, Ridicule, Insult, or Other Abusive Conduct

The first element requires Ms. James to prove that she was subject to unwelcome harassment, ridicule, insult, or other abusive conduct.

Conduct is considered unwelcome if it was not solicited or invited by Ms. James.[2] You must consider the context in which alleged conduct occurred, including Ms. James's behavior.[3]

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[2] *See, e.g.*, *Carrero v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("The facts here plainly demonstrate that Peterson's conduct was unsolicited and unwelcome and that Carrero's working environment was pervasively altered by his advances.").

[3] *See Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 551 (2d Cir. 2010) ("Preliminarily, we note that although it may well be that if there were no history of sexual harassment or any gender-based comments the gift of a pussy willow bush would carry no sexual implications, the matter of whether the plant "necessarily" had a sexual connotation was not the proper inquiry on a motion for summary judgment by the defendant. More importantly, the court was required to view the gift of the pussy willow bush to Kaytor in the context of the other evidence in this case. That evidence, taken in the light most favorable to Kaytor, showed, *inter alia*, that McCarthy frequently made comments about women's bodies; that Kaytor many times caught McCarthy leering at her and staring at her body; and that McCarthy had already made two other blatant references to Kaytor's genitalia: stating on one occasion that Kaytor was about to spread her legs for her doctor; and on another, when Kaytor was going to see her gynecologist, that she was going where every man wanted to be. In light of this evidence, the district court could not properly decide as a matter of law that the gift to Kaytor of a pussy willow bush neither had nor was intended to have any sexual connotations."); *Billings v. Town of Grafton*, 515 F.3d 39, 48 (1st Cir. 2008) ("The highly fact-specific nature of a hostile environment claim tends to make

Offensive conduct may include, but is not limited to: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.[4]

2. Motivated, at Least in Part, by Race

The second element requires Ms. James to prove not only that the alleged offensive conduct occurred, but also that it was motivated, at least in part, by Ms. James's race.[5]

Title VII only protects employees from offensive conduct that is based on their protected status—in this case, based on race. There may be many reasons why people do not get along in the workplace that do not implicate unlawful conduct. The question you must answer in this case is whether Ms. James was subject to the alleged harassment/offensive conduct, or an environment permeated with such conduct, because of her race.[6]

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it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior. Conduct that amounts to sexual harassment under one set of circumstances may, in a different context, equate with the sort of 'merely offensive' behavior that lies beyond the purview of Title VII, and vice versa.") (citations omitted).

[4] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120–21 (2002) (affirming viability of hostile work environment claim based on evidence "that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors, and used various racial epithets."); *Petrosino v. Bell Atl.*, 385 F.3d 210, 224 (2d Cir. 2004) (fnding that, *inter alia*, constant sexual banter followed by sarcastic apologies, and sexual graffiti at outdoor work sites were sufficient to support a Title VII claim); *see also Billings*, 515 F.3d at 48 ("Of course, behavior like fondling, come-ons, and lewd remarks is often the stuff of hostile environment claims, including several previously upheld by this Court . . . . But, as we have said, no particular 'types of behavior' are essential to a hostile environment claim.") (citations omitted).

[5] *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 440 (2d Cir. 1999) ("Of the fifteen incidents about which Richardson complains, only three have any racial overtones whatsoever . . . . Indeed, only one involves Richardson's protected racial category . . . . [T]o sustain a Title VII hostile environment claim Richardson must show more—she must produce evidence that she was discriminated against because of her race . . . .").

[6] *Cf. Gorzynski v. JetBlue Airways Corp.*, 593 F.3d 93, 102 (2d Cir. 2010) ("We must also consider the extent to which the conduct occurred because of the plaintiff's sex."); *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) ("It is axiomatic that mistreatment at work, whether through subjection to a hostile environment or through such concrete deprivations as being fired or being denied a promotion, is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic."); *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999) ("A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class.").

The alleged conduct need not be explicitly racial in nature.[7] The conduct also need not be targeted at Ms. James specifically, nor must she have herself heard or witnessed the alleged conduct firsthand.[8]

Rather, the evidence must show that, but for Ms. James's race, she would not have been subjected to a change in working conditions—a hostile or abusive working environment—as a result of that conduct.[9]

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[7] *Cf. Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002) ("Although we conclude ultimately that Alfano failed to demonstrate a sex-based hostile work environment, we reject (as the district court rejected) the argument that such a claim can be supported only by overtly sexual incidents. There is little question that incidents that are facially sex-neutral may sometimes be used to establish a course of sex-based discrimination—for example, where the same individual is accused of multiple acts of harassment, some overtly sexual and some not.") (citing *Raniola v. Bratton*, 243 F.3d 610, 622–23 (2d Cir. 2001); *Howley v. Town of Stratford*, 217 F.3d 141, 155–56 (2000)).

[8] *See Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) ("The district court also erred in failing to consider the eight additional incidents that did not occur in Schwapp's presence. The eight incidents include one racially-hostile comment made prior to Schwapp's employment, five racially-hostile comments made while Schwapp was with the APD, and two comments made during Schwapp's employment that were hostile toward minority groups of which Schwapp is not a member. Each of these eight incidents occurred outside of Schwapp's presence and allegedly was relayed to Schwapp by other APD officers . . . . The mere fact that Schwapp was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment.") (citing *Rodgers v. W.–S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997)); *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007) ("a plaintiff need only allege that she suffered a hostile work environment because of her gender, not that all of the offensive conduct was *specifically* aimed at her."); *Brown*, 257 F.3d at 255 ("[W]e do not find dispositive the fact that much of the challenged conduct had Parrett as its most immediate victim and audience. To the extent that co-workers' conduct toward Parrett, or other men in the workplace, revealed their hostility toward Brown, or was part of a campaign to isolate her from workplace allies, *on account of her sex*, such conduct could contribute to the creation of an actionably hostile work environment for plaintiff.") (citations omitted). *But see Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 189 (2d Cir. 2001) ("The women who were allegedly harassed were working in another part of the employer's premises, out of Leibovitz's sight and regular orbit; they were doing another job, and were allegedly subjected to harassment by a supervisor who supervised them but did not supervise Leibovitz; the experiences of those women came to Leibovitz's notice via hearsay (and were not proved). In these circumstances, plaintiff cannot demonstrate that she suffered harassment either in subjective or objective terms.").

[9] *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'") (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

In other words, you must determine whether Ms. James would have been subject to the same conduct—or to an environment permeated by that conduct—if she was not African-American.[10]

3. Severe or Pervasive

The third element requires Ms. James to prove that, taken together, the workplace was permeated with discriminatory intimidation, ridicule, or insult that is sufficiently severe or pervasive to alter the conditions of Ms. James's employment and create an abusive working environment.[11]

This element is often described as having both "objective" and "subjective" components.[12] Taken as a whole, the conduct complained of must be severe or pervasive enough that a reasonable person would find it hostile or abusive, and Ms. James must have subjectively perceived the work environment to be abusive.[13]

a. Objective Component

There is no mathematical formula or test for deciding whether an incident or series of incidents is, objectively speaking, severe or pervasive enough to alter the conditions of a plaintiff's

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[10] *Cf. Brown*, 257 F.3d at 253–54 ("In other words, what matters in the end is not how the employer treated *other* employees, if any, of a different sex, but how the employer *would have* treated *the plaintiff* had she been of a different sex.").

[11] *See Raspardo v. Carlone*, 770 F.3d 97, 114 (2d Cir. 2014) ("To establish a hostile work environment claim under the Title VII framework, a plaintiff must show that the 'workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'") (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (O'Connor, J.)).

[12] *See Raspardo*, 770 F.3d at 114 ("This standard has both objective and subjective components: the conduct complained of must be severe or pervasive enough that a reasonable person would find it hostile or abusive, and the victim must subjectively perceive the work environment to be abusive.")

[13] *See Harris*, 510 U.S. at 21–22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")

working environment.[14] Instead, you must assess the totality of the circumstances,[15] considering factors including but not limited to the following:

- **Quantity**: how much of the alleged conduct occurred over the course of Ms. James's employment?
- **Frequency**: how often did the alleged conduct occur?
- **Severity**: how severe was the alleged conduct?
- **Physically Threatening or Humiliating, or a 'Mere Offensive Utterance'**: was the alleged conduct physically threatening to Ms. James? Did it humiliate her? Or was it merely an offensive remark?
- **Interference with Work Performance**: did the alleged conduct unreasonably interfere with Ms. James's work performance?
- **Effect on Psychological Well-Being**: how did the alleged conduct affect Ms. James's psychological well-being?

None of these factors, on its own, proves or disproves that the work environment was objectively abusive.[16]

[14] *See Harris*, 510 U.S. at 22–23 ("This is not, and by its nature cannot be, a mathematically precise test.").

[15] *See Harris*, 510 U.S. at 23 ("But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances."); *Terry v. Ashcroft*, 336 F.3d 128, 148–49 (2d Cir. 2003) ("In determining whether a hostile environment exists, we must look at the 'totality of the circumstances.'") (quoting *Richardson*, 180 F.3d at 437–38).

[16] *See Terry*, 336 F.3d at 148–49 ("While the standard for establishing a hostile work environment is high, we have repeatedly cautioned against setting the bar too high, noting that '[w]hile a mild, isolated incident does not make a work environment hostile, the test is whether "the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse.*' The environment need not be 'unendurable' or 'intolerable.' Nor must the victim's 'psychological well-being' be damaged. In short, 'the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases.'") (quoting *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000); *Fitzgerald v. Henderson*, 251 F.3d 345, 358 (2d Cir. 2001)) (some internal quotation marks omitted); *Harris*, 510 U.S. at 22 ("Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.") (internal citation omitted).

You also do not have to find that the alleged conduct was both severe and pervasive.[17] Only severity or pervasiveness must be proven.[18] Accordingly, while a one-time, isolated incident is generally not pervasive enough to alter the conditions of a plaintiff's working environment,[19] a single incident that involves sufficiently severe conduct may be severe enough alter the conditions of a plaintiff's working environment.[20]

In other words: the more severe the alleged conduct, the less frequent it must be for you to find that it altered the conditions of Ms. James's employment.[21] On the other hand, alleged conduct that is not severe on its own may have altered the conditions of Ms. James's employment if it was repeated frequently enough.[22]

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[17] *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) ("Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of her working environment.") (quoting *Perry*, 115 F.3d at 149).

[18] *Id.*; *see also Pucino v. Verizon Wireless Comm'cns*, 618 F.3d 112, 119 (2d Cir. 2010) ("In establishing this element, a plaintiff need not show that her hostile working environment was both severe *and* pervasive; only that it was sufficiently severe *or* sufficiently pervasive, or a sufficient combination of these elements, to have altered her working conditions.") (emphasis in original) (citing *Terry*, 336 F.3d at 148–49 ; *Brennan v. Metro. Opera Ass'n*, 192 F.3d at 318).

[19] *See Raspardo*, 770 F.3d at 114 ("The incidents complained of 'must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'") (quoting *Alfano*, 294 F.3d at 374; *Cruz*, 202 F.3d at 570 ("Isolated instances of harassment ordinarily do not rise to this level.").

[20] *Alfano*, 294 F.3d at 374 ("[I]t is well settled in this Circuit that even a single act can meet the threshold if, by itself, it can and does work a transformation of the plaintiff's workplace.") (citations omitted); *Richardson*, 180 F.3d at 439 (2d Cir. 1999) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n—ger' by a supervisor in the presence of his subordinates.") (quoting *Rodgers v. W.–S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)), a*brogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014) (same); *DiStiso v. Cook*, 691 F.3d 226, 243 (2d Cir. 2012) (same); *La Grande v. DeCrescente Distrib. Co., Inc.*, 370 F. App'x 206, 210 (2d Cir. 2010) (same); *Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App'x 547, 549–50 (2d Cir. 2007) (same); *Ricks v. Conde Nast Publ'ns*, 6 F. App'x 74, 79 (2d Cir. 2001) (same); *Cruz*, 202 F.3d at 572 (same); *see also Daniel v. T & M Protection Res., LLC*, 689 F. App'x 1, 2 (2d Cir. 2017).

[21] *See, e.g.*, *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820, 822–25 (S.D.N.Y. 2001) (white supervisor's display of a noose on the wall behind his desk for three days, until one of plaintiffs asked him to take it down, was on its own sufficiently severe conduct to support hostile work environment claim because "[r]acially motivated physical threats and assaults are the most egregious form of workplace harassment" and "[t]he display of a noose would fall within this category of intimidating conduct.").

[22] *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 82 (2d Cir. 2009) ("Core hostile work environment cases involve misconduct that is both frequent and severe, for example, when a supervisor utters "blatant racial epithets on a

The ultimate question you must ask yourselves is whether, based on the totality of the circumstances, the conduct was severe enough or pervasive enough—or a sufficient combination of the two—that a reasonable person in plaintiff's position would find it hostile or abusive.[23]

b. Subjective Component

In addition to proving that the work environment would be hostile or abusive to a reasonable person in plaintiff's position, Ms. James must also prove that she subjectively perceived the work environment to be hostile or abusive because of her race.[24]

Ms. James must prove, in other words, that she actually perceived that she was subjected to a hostile or abusive work environment during the course of her employment.[25]

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regular if not constant basis" and behaves in a physically threatening manner. But an employer's motion for summary judgment must be denied if the claimed misconduct ranks sufficiently highly on either axis.") (citations omitted).

[23] *See, e.g.*, *Mack v. Port Auth. of N.Y. & N.J.*, 225 F. Supp. 2d 376, 389 (S.D.N.Y. 2002) ("Although the Court accepts as true for the purposes of this analysis Plaintiff's assertions that he perceived the work environment as hostile on account of race, the evidence he proffers is insufficient to satisfy the objective prong of the hostile work environment analysis—that the conduct was so severe and pervasive that a reasonable person would find the environment hostile or abusive on account of race.") (citations omitted).

[24] *See Harris*, 510 U.S. at 21–22 ("Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[25] *See Raniola*, 243 F.3d at 621 ("Raniola must also prove that she subjectively perceived her treatment as abusive. We disagree with the district court's conclusion that '[t]here is no evidence that plaintiff herself felt that the use of barnyard street expletives directed to her or directed to others made her work environment offensive,' and find that there was substantial evidence upon which a reasonable jury could find that Raniola perceived her treatment as abusive. Raniola testified that after she discovered that the word 'cunt' was written across her name in a police ledger, she went to the precinct's Integrity Control Officer Lt. Frank Leissler to complain. After Kissik told Raniola that his daughter-in-law 'wears the pants in the family, my son-in-law [sic] doesn't smack her around,' Raniola testified that she 'just wanted to get away from [Kissik].' Following Kissik's reference to a woman who had a protective order as a 'bitch,' Raniola lodged a complaint against Kissik with the Bronx IAB that included an allegation of sex discrimination. Based on these facts, a reasonable jury could conclude that Raniola perceived her treatment to be abusive."); *Brown*, 257 F.3d at 256 ("Here, however, there is overwhelming evidence that the hostility toward Brown was grounded in workplace dynamics unrelated to her sex and that even these pictures did not reflect an attack on Brown *as a woman.* Moreover, and crucially, this overwhelming evidence derives substantially from Brown herself, and her own view, clearly expressed, that the harassment was fundamentally the product of a workplace dispute stemming from the union election, and not from her being a woman. Given her repeated statements to that effect, we are reluctant to allow her to rescue her claim with a last-minute conversion to the position that, instead of what she had consistently said before, she faced adverse conditions because she is a woman."); *Brennan*, 192 F.3d at 318 ("A work environment will be considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it.") (citation omitted).

4. Employer's Liability

If you find that Ms. James has demonstrated that she was subject to a hostile work environment because of her race, you must then determine whether there is a specific basis exists for holding her employer, Restaurant Depot, liable for the acts of harassing or offensive conduct to which she was subjected.[26]

a. Co-Worker vs. Supervisor

First, you have to determine whether the individual or individuals who committed the alleged conduct were Ms. James's co-workers or supervisors.

If the alleged conduct was committed by an employee empowered to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, that employee is considered a supervisor.[27] Accordingly, you must determine whether the employee had the formal authority to take such an action against Ms. James—regardless of whether they actually did take such an action.[28]

If the alleged conduct was committed by an employee who did not have such formal authority with respect to Ms. James, that employee is only considered a co-worker.

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[26] *See Whidbee*, 223 F.3d at 72 ("[P]laintiffs must show not only severe or pervasive harassment but also 'a specific basis ... for imputing the conduct that created the hostile environment to the employer.'") (citation omitted) (in context of § 1981 hostile work environment claim, for which same standard as Title VII applies).

[27] *See Vance*, 570 U.S. at 431 ("We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

[28] *See Wiercinski v. Mangia 57, Inc.*, 787 F.3d 106, 114 (2d Cir. 2015) ("In other words, a supervisor is an individual 'empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.'") (quoting *Vance*, 570 U.S. at 440).

b. Employer's Liability For Actions Of Supervisors

If you have determined the alleged conduct was committed by a supervisor, ~~you must then determine whether Ms. James experienced a tangible employment action as a result of the alleged conduct.~~

~~A tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.~~

~~If you find that the alleged conduct was committed by a supervisor and resulted in a tangible employment action against Ms. James, Restaurant Depot is strictly liability for the hostile work environment.[29]~~

~~If you find that no tangible employment action resulted from the alleged conduct, however,~~ you must then determine whether Restaurant Depot has proven, by a preponderance of the evidence, that it has an affirmative defense to this liability.[30] For Restaurant Depot to prove this, they must show two elements.[31]

1. That Restaurant Depot exercised reasonable care to prevent and promptly correct the harassing or offensive conduct; and

2. That Ms. James unreasonably failed to take advantage of any preventive or corrective opportunities provided by Restaurant Depot to avoid the harm.

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[29] ~~*See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.").~~

[30] *See Faragher v. City of Boca Raton*, 524 U.S. 775, ~~at~~ 807 (1998) ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.")

[31] *See Faragher*, 524 U.S. at 807 ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.")

If you are persuaded that Restaurant Depot has proven both of these elements, then Restaurant Depot has a full affirmative defense, and you must find for Defendants on the question of liability.

c. Employer's Liability for Actions of Co-Workers

If you have determined the alleged conduct was committed by a co-worker, you must then determine whether Restaurant Depot was negligent in permitting the alleged conduct to occur.

To prove Restaurant Depot was negligent, Ms. James must show that Restaurant Depot either provided no reasonable avenue for her to complain of the alleged conduct, or that Restaurant Depot knew about the alleged conduct—or reasonably should have known—but failed to take reasonable steps to remedy it.[32]

Whether Restaurant Depot has taken reasonable care is to be determined by your assessment of the facts before you. Factors you may consider include, but are not limited to: the gravity of the harm, the nature of the work environment, and the resources available to the employer.[33] Restaurant Depot need not prove success in preventing the alleged conduct to demonstrate that it took reasonable care to prevent and correct it.[34] That said, you may consider

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[32] *See Whidbee*, 223 F.3d at 72 ("Because the harassment here was by a co-worker and not a supervisor, the plaintiffs must demonstrate that GFS 'either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.' '[A]n employer will be liable in negligence for a racially ... hostile work environment created by a victim's co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action.'") (quoting *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996); *Richardson*, 180 F.3d at 446); *Snell v. Suffolk Cty.*, 782 F.2d 1094, 1104 (2d Cir. 1986) ("This standard places a reasonable duty on an employer who is aware of a racially discriminatory atmosphere adversely affecting the emotional well-being and productivity of its employees to take reasonable steps to remedy it . . . . Accordingly, we hold today that once an employer has knowledge of a racially combative atmosphere in the workplace, he has a duty to take reasonable steps to eliminate it.

[33] *Snell*, 782 F.2d at 1104 ("Whether an employer has fulfilled his responsibility in this regard is to be determined upon the facts in each case. Factors that may be considered are the gravity of the harm, the nature of the work environment, and the resources available to the employer.").

[34] *See Whidbee*, 223 F.3d at 72 ("To be sure, '[a]n employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct.'") (quoting *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999).

whether the alleged conduct continued after complaints about it were made when assessing whether Restaurant Depot's response was reasonable.[35]

If Ms. James has proven that Restaurant Depot was negligent, Defendants are liable for the hostile work environment.[36]

[35] *See Whidbee*, 223 F.3d at 72 ("However, we have held that if harassment continues after complaints are made, reasonable jurors may disagree about whether an employer's response was adequate.") (citing *Richardson*, 180 F.3d at 442; *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999)).

[36] *See Vance*, 570 U.S. at 445 ("In such cases, the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur . . . .").

III. DAMAGES

It is exclusively your function to decide upon liability. I am instructing you on the law of damages so that, if you decide that Ms. James is entitled to recover against Defendants, you will have guidance as to how you should proceed to determine damages. As I mentioned previously, although there are several corporate defendants in this case, they jointly employed Ms. James and are treated, for purposes of determining liability, as one employer—although I may refer to them collectively in my instructions as "Defendants."

A. GENERAL INSTRUCTIONS ON DAMAGES

If Ms. James fails to prove the elements of her claim of liability, Defendants will have prevailed on the issue of liability and you should not consider the issue of damages. In other words, only if Ms. James has proven, by a preponderance of the evidence, that Defendants are liable to her should you address the issue of damages.

Before I instruct you on the issue of damages, a few words of caution are in order. The fact that I am instructing you on the subject of damages does not mean that I have an opinion one way or the other on whether you should or should not reach the issue of damages in your deliberations. Again, you are only to reach the issue of damages, if you find by a preponderance of the credible evidence that Ms. James has established her claim. These instructions are for your guidance, only if you reach the issue of damages.

In respect to the damages claimed, as in respect to every other matter before you, you can award only such damages as are justified by the proof and the law. The burden is on Ms. James to satisfy you by a fair preponderance of the evidence, as to the extent and nature of the losses she suffered as a result of the acts of Defendants. It is not Defendants' burden to disprove the claimed losses. Our law permits counsel for any party to argue to the jury his or her view of the proper amount of damages. You should understand that what a lawyer says about the amount of

damages is not evidence, but only argument and the determination of the amount to be awarded, if any, is solely your function and in your deliberations you may accept or disregard his or her argument on the amount of damages.

B. COMPENSATORY DAMAGES

The purpose of money damages is to compensate Ms. James for the damages inflicted on her by any violations of the law that she has proven. Compensatory damages are limited to restoring to a plaintiff, as far as money can, what she lost because of the harm she suffered. They are not awarded to punish a defendant for its unlawful actions.

The law places the burden on Ms. James to prove facts that will enable you to arrive at the amount of damages with reasonable certainty. This is not a requirement of mathematical precision and you are permitted to determine the amount of damages by estimation or approximation, as long as Ms. James provides you with a reasonable basis for such estimation or approximation, such that you are not required to make a calculation by guessing or speculation. You should be guided by dispassionate common sense.

If Ms. James has proved all the essential elements of ~~his~~ her claim, then you must award her a sum of money that, you believe will fairly and justly compensate her for any injury you believe he actually sustained, as a proximate result of the defendants' misconduct. You shall award damages only for those injuries that you find Ms. James has proven by a preponderance of the evidence. Moreover, you may not simply award damages for any injury suffered by Ms. James—you must award damages only for those injuries that are a proximate result of conduct by a defendant that violated Ms. James's rights under Title VII.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial.

There are two types of compensatory damages: economic damages and non-economic

damages.

Economic damages are compensation for pecuniary losses, which may include money actually spent or debts incurred as a result of the injury, such as medical bills and expenses.

Non-economic damages, on the other hand, are compensation for all non-pecuniary losses including mental and emotional suffering pain and suffering, humiliation, embarrassment, fear, anxiety, and/or anguish.

~~**1.** Lost Income or Backpay~~

~~If you determine that the alleged conduct that subjected Ms. James to a hostile work environment was committed by her supervisor and led to a tangible employment action, you may award economic damages in the form of lost income or back pay to redress the economic injury that Ms. James suffered. Such an award may include lost wages as calculated from the date of the tangible employment action to the date of judgment in this case, minus the amount of earnings and benefits that Ms. James received from other sources during that time~~

~~**2.** Emotional Distress~~

~~You may award compensatory damages for any pain, suffering or mental anguish that Ms. James experienced as a result of Restaurant Depot's conduct that you find render it liable.~~ There is no exact standard for fixing this amount of compensation, and the law does not require Ms. James to prove with mathematical precision the amount of losses for such emotional distress. You should base any award of damages for emotional distress on the basis of evidence of record; any amount awarded must be fair and not based on sympathy or speculation.

C. NOMINAL DAMAGES

If you find that Defendants violated Ms. James's rights under Title VII, but find that she has failed to prove by a preponderance of the evidence that she suffered any actual injury or loss

as a result, then you may return an award of "nominal damages" in the sum of one dollar, demonstrating that liability has been proved. [37]

D. PUNITIVE DAMAGES

In addition to either compensatory or nominal damages, you may, but need not, assess punitive damages against Defendants, if you find in favor of Ms. James on her claim.

An award of punitive damages is discretionary, which means that, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages or you may decide not to do so. In making the decision whether to award punitive damages against a defendant, you should consider the underlying purposes of punitive damages. These purposes are to punish a defendant and to set an example in order to deter him or her or others from committing similar acts in the future. Punitive damages are intended to protect the community and to express the jury's indignation at the misconduct.

You may award punitive damages against Defendants with respect to Ms. James's claim under Title VII if Ms. James has proven, by a preponderance of the evidence, that Restaurant Depot acted with malice or reckless indifference to the *federally protected* rights of Ms. James.[38]

In this context, malice or reckless indifference refer to the employer's knowledge that it may be acting in violation of federal law—not its awareness that it is engaging in

[37] *See Wiercinski*, 787 F.3d at 111 ("The jury awarded Wiercinski nominal damages in the amount of $1 and punitive damages in the amount of $900,000."); *Patterson v. Balsamico*, 440 F.3d 104, 110 (2d Cir. 2006) ("The jury also found that the conduct was sufficient to alter the terms and conditions of Patterson's employment in that it created a hostile work environment. The jury found, however, that the hostile work environment was not a proximate cause of actual damages to Patterson and thus awarded only one dollar in nominal damages for the violations of Patterson's right to be free from a racially hostile work environment.").

[38] 42 U.S.C. § 1981a ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

discrimination.[39] In addition, Restaurant Depot may not be held liable for punitive damages of supervisors where those decisions are at odds with the employer's good-faith efforts to comply with Title VII.[40]

In deciding whether to award punitive damages, consider whether punitive damages are necessary to punish the wrongful conduct or deter a defendant or others from engaging in it in the future. In fixing the amount of punitive damages, you may consider all of the factors proven by the evidence, including the behavior of Defendants at trial and whether Defendants have shown any genuine repentance for any misconduct.

If you award punitive damages against Defendants with respect to claims under Title VII, you should indicate on the Verdict Form the amount of punitive damages to be awarded, bearing in mind that the law requires that punitive damages, if awarded, must be fixed with calm discretion and sound reason. The amount must not reflect bias, prejudice, or sympathy toward any party, but is to be an amount you believe necessary to fulfill the purposes of punitive damages, as I have described them.

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At this point, I will pause the jury instructions to hear closing arguments of counsel. I will conclude the instructions after those summations. Remember, what the lawyers say in their closing arguments is not evidence, but it is merely argument about what they believe the evidence shows.

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[39] *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) ("The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.").

[40] *See Kolstad*, 527 U.S. at 545 ("Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII.").

IV. FINAL INSTRUCTIONS

You have now heard my instructions on the law and the parties' closing arguments. I remind you that the parties' arguments are not evidence. I will now give you some final instructions before you begin your deliberations.

A. NOTE TAKING

You were permitted to take notes during the course of the trial. Any notes you have taken should be used only as memory aids; do not give your notes more importance than your independent recollection of the evidence. If you did not take notes, you should rely on your own memory of the proceedings and should not be unduly influenced by the notes of other jurors. The fact that a particular juror has taken notes entitles that juror's opinions to no greater weight than those of any other juror, and your notes are not to be shown to any other juror during the course of deliberations. Your notes are not evidence.

B. UNANIMOUS VERDICT

Your verdict must be unanimous and represent the considered judgment of each juror.

Each of you must make your own decision, but you must consider impartially all of the evidence and the views of your fellow jurors. It is your duty to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with the individual judgment of each juror. Until a verdict is agreed to by each juror, it is not a unanimous verdict.

In the course of your discussion, do not hesitate to re-examine your own individual views, or to change your opinions, if the deliberations and the views of your fellow jurors convince you to do so. You should not surrender, however, your honest convictions about the facts or about the weight or effect of the evidence solely because of the opinion of your fellow jurors or merely to bring an end to deliberations.

Remember at all times that you are not a partisan. Rather, you are the judges of the facts and your sole interest is to seek the truth from the evidence in this case.

C. FOREPERSON AND DELIBERATIONS

When you return to the jury room, you should first elect one person to act as your foreperson. The foreperson does not have any more power or authority than any other juror, and his or her opinion does not count for any more than any other juror's vote or opinion. The foreperson merely presides over your deliberations and is your spokesperson to the Court. He or she will send out any notes, and when the jury has reached its verdict, he or she will notify the Marshal that the jury has reached its verdict and you will come out into open court and give the verdict.

After you have retired to begin your deliberations, you are not to leave your jury room without first notifying the Marshal, who will escort you. No deliberations may take place without all jurors being present. If, at any time, a juror is in the bathroom facilities, the other jurors must cease deliberations and not resume deliberations until all jurors are present. Likewise, if at any time a juror is on a cell phone, the other jurors must cease deliberations immediately and may not begin deliberations again until all cell phones are off. If you bring your cell phones into the jury room, you must turn them off during deliberations.

Finally, you are prohibited from conducting any outside research on the case. You must not research any issue nor communicate with any person about the case through the Internet, smart phones, tablets, e-mail, text messaging, social media, blogs, Internet chat rooms, social networking websites, or any other forms of electronic communication.

D. VERDICT FORM

As mentioned at the outset of these instructions, a Verdict Form has been prepared for your convenience. Focusing on the questions set forth in the Verdict Form will assist you in your

deliberations. I want to caution you now to take your time when completing the Verdict Form. Let me ask you to look at the Verdict Form now, and I will walk through it briefly with you. As you can see, the Form consists of a series of questions. Each question calls on you either to check "yes" or "no" or to write in a monetary amount. Answer each question as it appears and only those questions shown on the Form. As you review the Form, you will see that there are instructions in ***bold-faced italicized type***. Please read these instructions and follow them carefully. Depending on your answer to a particular question, it may not be necessary to answer a later question. Finally, be consistent in your responses.

You must complete and return the Verdict Form to the Court when you have reached a unanimous agreement as to your verdict. You will have the original Verdict Form in the deliberation room, and I will ask the Courtroom Deputy to collect the copies at this time. You will be asked to answer the questions in the order in which they appear on the form, and each answer must be unanimous.

When you have reached unanimous agreement as to your verdict, you will have your foreperson fill in your answers, and date and sign the Verdict Form. If the foreperson makes any error in completing the Verdict Form, please do not strike out the error and add a correct response. Instead, please request a new Verdict Form, so that the Verdict Form that is submitted is error-free. Then inform the Marshal or Courtroom Deputy that you have reached your verdict. The Verdict Form must be used only in connection with the charge I have just given to you. The terms used in the Verdict Form are discussed in my instructions, and these instructions must govern your deliberations.

E. ADDITIONAL INSTRUCTIONS

Shortly after you go into the jury room, Ms. Perez will bring you the exhibits in this case. Do not begin your deliberations until she has brought you the exhibits. Do not even elect a

foreperson until she has brought you the exhibits, as it is very important that your deliberations remain entirely private and without interruption.

In the jury room, you will have exhibits with you, but you will not have a transcript of the testimony. If you need to have testimony read back to you, we will do so. However, please understand that it is difficult and time-consuming to locate and read back testimony. If you nevertheless require a read-back, please be as specific as possible about the portions of the testimony you want to hear.

Your requests for a read-back of testimony and, in fact, any communication with the Court must be made to me in writing, signed by your foreperson, and given to the Marshal or Courtroom Deputy. I will respond to your request as promptly as possible either in writing or by having you return to the courtroom so that I can address you orally.

I also must caution you that in your communications with the Court you should never reveal your numerical division at any time. If you are divided, do not report how the vote stands, and if you have reached your verdict, do not report what it is until you are asked in open court.

A note about timing. We ordinarily end our trial day at 4:00 p.m. But that is not a constraint on your deliberations, and you should certainly not rush to meet any deadline. You may choose, if you find it necessary, to deliberate past 4:00 p.m. You may also choose to break at 4:00 p.m. and resume deliberations tomorrow. It is your decision. Whatever you decide, we will be here.

It is proper to add a final caution. Nothing that I have said in these instructions—and nothing that I have said or done during the trial—has been said or done to suggest to you what I think your verdict should be. What the verdict shall be is your exclusive duty and responsibility.

As you deliberate, determine the facts on the basis of the evidence as you have heard it and apply the law as I have outlined it for you. Render your verdict fairly, uprightly, and without

a scintilla of prejudice. Take as long as you think is necessary to fairly and impartially reach your verdict.

Members of the jury, that concludes my instructions to you. Thank you for your patience and attention. You may now retire. The Marshal will escort you to the jury room where you will begin your deliberations.